TIR 13-6: Calculation and Recapture of Certain Tax Incentives from Decertified Life Sciences Companies

I. Introduction/Purpose

On June 16, 2008, the Commonwealth adopted "An Act Providing for the Investment in and Expansion of the Life Sciences Industry in the Commonwealth" (the Act). St. 2008, c. 130. The Act established the Life Sciences Investment Program as well as the Life Sciences Tax Incentive Program pursuant to G.L. c. 23I, § 5(a), (d), respectively. The goal of the Act is to expand employment in the life sciences sector in Massachusetts and to promote health-related innovations by supporting research, development, manufacturing and commercialization in the life sciences. Technical Information Release (TIR) 08-23[1] summarized the tax incentives available to certified life sciences companies through the Life Sciences Tax Incentive Program, which is administered by the Massachusetts Life Sciences Center ("the Center").

The purpose of this TIR is to provide rules explaining the requirement to recapture two of the various tax incentives received by a certified life sciences company whose certification is subsequently revoked by the Center. In particular, this TIR addresses the rules relating to the recapture of the refundable research credit awarded under G.L. c. 63, § 38M(j) and the refundable life sciences investment tax credit received under G.L. c. 62, § 6(m)(2) or c. 63, § 38U.

II. Discussion

A. General

Chapter 23I of the General Laws contains provisions regarding the authorization of certain tax incentives by the Center to certified life sciences companies. It also contains provisions relating to revocation of certification, and the subsequent disallowance and recapture of tax benefits in the event of such revocation. *See generally* G.L. c. 23I, §§ 4, 5. The Commissioner of Revenue is responsible for promulgating regulations and issuing public written statements governing the recapture of the life sciences tax incentives offered pursuant to chapters 62, 63, 64H and 64I of the General Laws.

In general, certification granted by the Center pursuant to G.L. c. 23I, § 5(b) is valid for 5 years starting with the tax year in which certification is granted. G.L. c. 23I, § 5(e)(1). However, the certification of a life sciences company may be revoked prior to the expiration of the certification period pursuant to G.L. c. 23I, § 5(e)(2). If, after an independent investigation, it is determined that representations made by a certified life sciences company in its certification proposal are materially at variance with the conduct of the life sciences company after receiving certification, the Center may revoke a company's certification in accordance with the provisions of G.L. c. 23I, § 5(e)(2). The Center must revoke the certification of a life sciences company when independent investigations conducted in two consecutive years determine that representations made by the life sciences company in its project proposal are deemed materially at variance with its conduct pursuant to G.L. c. 23I, § 5(e)(2) or 5(f). G.L. c. 23I, § 5(g). The Center is responsible for notifying the Commissioner of its determination, as well as effective date of revocation.

B. Effect of Revocation of Certification as a Life Sciences Company

When the Center revokes a life sciences company's certification, and upon receiving notice of the revocation from the Center, the life sciences company must recapture the value of any credits, exemptions, deductions or other benefits allowed by the original certification.[2] See G.L. c. 23I, § 5(e)(3). The amount to be recaptured is calculated commencing with the first day of the taxable year for which the revocation is effective (i.e. the first day of the taxable year in which a material variance commenced, as determined by the Center). The amount required to be recaptured must be added as additional tax due and reported by the taxpayer on the tax return for the year in which the Center actually makes the determination to revoke a life sciences company's certification. The Commissioner also has the authority to assess additional taxes due as a result of these recapture rules by making deficiency assessments or jeopardy assessments, as appropriate. *See, generally,* G.L. c. 62C, § 26 et seq.; 830 CMR 62C.26.1.

In general, recapture of tax benefits previously claimed will be pro-rated using one of various possible methods, depending on the benefit claimed and the statute governing each benefit. Regardless of the particular recapture method to be used, the taxpayer is required to recapture all previously taken amounts relating to any period during which the taxpayer's conduct was at material variance with its commitments. Additionally, a decertified life sciences company is required to recapture any life sciences incentives taken during any period prior *to* the actual commitment period specified in its certification proposal in anticipation of fulfilling its job commitments. *See*, *e.g*., Example 1, below.

A decertified life sciences company owing recapture tax on account of any life sciences credit for which it previously received a refund may not reduce its tax liability for the current year to the extent derived from the recapture of the refunded credit by applying any non-refundable credit carryforwards it may have available against such liability. To allow such an offset would have the effect of converting a non-refundable credit into a refundable credit. To illustrate, the regular 3% investment tax credit allowed under G.L. c. 63, § 31A is a nonrefundable credit. Thus, by way of example, a decertified life sciences company that received a refund of the life sciences ITC may not reduce its liability to the extent derived from the recapture of the refunded life sciences ITC by using its regular non-refundable ITC credit carryforwards and current year credits attributable to G.L. c. 63, § 31A.[3] This rule is in contrast to the rule set forth in DOR Directive 01-9, which allows a taxpayer subject to recapture of certain *non-refundable* credits to reduce its liability by offsetting certain available *non-refundable* current year and carryforward credits against its liability.

C. Refundable Research Credit under G.L. c. 63, § 38M(j)(2)

1. Gross Award Amount

Pursuant to the Tax Incentive Agreement (‘Agreement”) between a certified life sciences company and the Center, a taxpayer may be awarded an incentive allowing it to receive a refund of a portion of its existing available excess research credits under G.L. c. 63, § 38M in lieu of carrying such credits forward. The Commissioner previously has indicated that unexpired research credit carryforwards from 2008 and earlier years can be made refundable in 2009 and thereafter, to the extent authorized by the Center. *See* TIR 08-23. Subject to limitations set forth in the Agreement, G.L. c. 63, § 38M, and G.L. c. 23I, an award recipient may be entitled to receive a refund of its existing research credits, up to a maximum of 90% of the gross award amount. The “gross award amount” is the amount indicated in the Agreement in the column entitled “Gross Amount of Tax Incentive Up to ($) of Tax Benefit.” In certain instances discussed in Section II C, 2., below, the maximum amount of refund a taxpayer is eligible to receive may be less than 90% of the gross award amount.

An award by the Center allowing a portion of a taxpayer’s research credits to be made refundable under G.L. c. 63, § 38M(j)(2) is <u>not</u> an award of additional research credits. A certified life sciences company must have already existing available research credits before it can determine how much of the gross award amount it may claim as a refund. Accordingly, if a taxpayer has no existing credits to apply against its liability, it shall not use any portion of the award amount to “create” credits for the purpose of reducing its liability. Similarly, if a taxpayer has no research credits remaining after applying its already available credits to reduce its liability, it is not entitled to a refund of any of the gross award amount. The award of a refundable life sciences research credit in the Tax Incentive Agreement pursuant to G.L. c. 63, § 38M(j)(2) merely allows a taxpayer whose credits exceed the amount that may otherwise be allowed under G.L. c. 63, § 38M (i.e., those credits remaining after applying the limitations of G.L. c. 63, § 38M(d)) ("available excess credits") to elect to have a portion of such credits to be made refundable in lieu of carrying them over to future years.

2. Refundable amount

The actual amount that can be made refundable pursuant to G.L. c. 63, § 38M(j)(2) is the lesser of the following amounts: 1) 90% of the gross award amount or: 2) 90% of the balance of its available excess credits.[4] Whether a taxpayer can receive the full 90% of the gross award amount as a refund will depend on whether the balance of its available excess credits is greater or less than the gross award amount. If the balance of its available excess credits is greater than or equal to the gross award amount, it is eligible to receive a full 90% of the gross award amount. If the balance of its available excess credits is *less than* the gross award amount, it can receive only 90% of the balance of such credits as a refund.

3. Carryforwards

A certified life sciences company may not carry forward any remaining balance of a life sciences refundable credit award after receiving a refund pursuant to G.L. c. 63, § 38M(j)(2). However, excess available research credits that exceed the gross award amount may be carried forward to reduce a taxpayer's liability in future years, subject to the general carryforward limitations of G.L. c. 63, § 38M(f). The rules illustrating refundable research credit amounts and carryforwards are illustrated by Examples 1, 2, and 3, below.

Example 1 illustrates the above-stated rule in situations where, after the taxpayer has used its available credits to reduce its liability, the gross award amount *is greater than* the taxpayer's available excess credits. In this case, the refundable amount is limited to 90% of the balance of the taxpayer's available excess credits. Example 2 illustrates the rule in situations where, after a taxpayer has used its available credits to reduce its liability, the gross award amount *is less than* the balance of the taxpayer's available excess credits. In this case, the refundable amount is limited to 90% of the gross award amount. Example 3 illustrates the effect of the research credit limitation imposed by G.L. c. 63, § 38M(d)[5] on the refundable life sciences research credit awarded under G.L. c. 63, § 38M(j)(2).

Example 1: Company A, a calendar year taxpayer, committed to hire and maintain a certain level of full time employees for five consecutive years. On December 23, 2009, Company A is granted certification as a certified life sciences company by the Center, effective January 1, 2010. The five year job commitment period commences January 1, 2010 (Year 1) and ends December 31, 2014 (Year 5). Pursuant to the terms in the Tax Incentive Agreement between Company A and the Center, Company A is awarded a gross award amount of $1,000,000 in refundable research credits under G.L. c. 63, § 38M(j)(2). This amount is reflected in the column entitled "Gross Amount Tax Incentive up to ($) of Tax Benefit" as a refundable research credit pursuant to G.L. c. 63, § 38M(j).

At the time of its certification, assume that Company A had $2,000,000 of unexpired research credit carryforwards from years prior to 2009 on its books pursuant to G.L. c. 63, § 38M(f). Such carryforwards are countable for purposes of calculating the amount of credits that can be made refundable. Assume further that after applying the rules of G.L. c. 63, § 38M, through the combination of its available research credits plus other available credits, Company A was able to reduce its 2009 tax liability to $456. After doing so, assume that the balance of its available excess research credits is $600,000.

In this case, the gross award amount (i.e. $1,000,000) is greater than Company A's excess available credits of $600,000. Thus, Company A has an available refundable credit of $540,000 (i.e.,90% of $600,000), of which $456 must be applied to its minimum excise. The balance of $539,544 will then be refunded if Company A has no other liabilities. In this example, if the taxpayer elects the refund option, the remainder of the gross award amount (i.e., $460,000) may not be carried forward as additional credits to offset taxpayer's tax liability in future years. *See* G.L. c. 63, § 38M(j)(2).

Example 2: Assume the same facts as in Example 1, except that, after reducing its liability to $456, Company A has $1,200,000 million in available excess credits. Since the gross award amount of $1,000,000 is less than Company A's available excess credits, it is entitled to receive up to $900,000 as a refundable credit, which is the maximum amount allowed by the Center (i.e. 90% of the gross award amount designated in the Tax Incentive Agreement). Company A must apply this award to its $456 minimum excise. The balance of $899,544 will then be refunded if Company A has no other liabilities. Per the Center's policy, as a consequence of the refund election, the remaining $100,000 of the $1,000,000 gross award amount may not be carried forward to future years as additional research credits. Accordingly, the taxpayer's research credit carryforwards must be adjusted to eliminate the remaining gross award amount of $100,000. After doing so, Company A's remaining available credits in excess of the gross award amount (i.e., $200,000) may be carried forward to future years, subject to the general carryforward limitations of G.L. c. 63, § 38M(f).

Example 3: Assume that Company B is a certified life sciences company that, prior to reducing its tax liability for the taxable year, has $1,275,000 in existing research credits and a tax liability of $1,025,000. Assume further that pursuant to its Tax Incentive Agreement with the Center, it has been awarded a refundable life sciences research credit award under G.L. c. 63, § 38M(j)(2), in a gross amount of $300,000. As previously indicated, this award is not an award of additional research credits. Rather, it simply allows Company B, after reducing its liability to the extent otherwise allowed by law, to elect to receive a portion of its available excess credits as a refund.

In calculating its liability for the current year, Company B must first apply its existing research credits against its $1,025,500 liability. Because of the 75% limitation imposed under G.L. c. 63, § 38M (d), the amount of research credit Company B may claim for the taxable year is limited to $775,000. This amount represents 100% of its first $25,000 corporate excise liability plus 75% of the amount of its tax liability in excess of $25,000 (i.e., $750,000). Company B may use this $775,000 of its available research credits to reduce its corporate excise liability for the taxable year to $250,000, leaving it with $500,000 in remaining research credits. Under the 75% limitation rules, such remaining credits cannot be used by a corporation or a certified life sciences company to offset its current year liability further, but may be carried forward to reduce its liability in future years, subject to the rules set forth in G.L. c. 63, § 38M.

Although Company B cannot ordinarily apply its remaining $500,000 in research credits against its current year excise liability of $250,000, it also has been granted a life sciences tax incentive. Because the balance of its $500,000 of available excess credits is greater than the gross award amount of $300,000, Company B has the option of receiving up to 90% of the gross award amount as a refund. This award has the following effect on Company X's liability. Company X may reduce its liability further by multiplying the gross award amount of $300,000 by 90% (i.e., $270,000). This $270,000, which represents the total amount of a cash refund it is entitled to receive, may be netted against its liability of $250,000, thereby reducing it to zero. The remaining $20,000 is available as an actual cash refund. The remaining 10% of the gross income award amount ($30,000) may not be carried forward. Thus, Company X's remaining allowable research credit carryover is $200,000 (i.e., $1,275,000-$775,000-$300,000). For rules pertaining to the recapture of the refundable research credit, see Examples 4 and 5, below.

4. Recapture of refundable research credit

a. Calculation of recapture amount

Recapture of the refundable research credit is calculated based on the portion of a recipient's jobs commitment period (e.g., 5 years) during which the recipient was in material variance with its jobs commitments or other representations made in its certification proposal, as determined by the Center. The amount of recapture tax is calculated by multiplying the amount of the credit taken by a fraction, the numerator of which is the number of years that Company A was not in compliance with its commitments, and the denominator of which is the total number of years of the jobs commitment. This rule is illustrated by the following examples:

Example 4: Assume the same facts as in Example 3. Assume further that Company B was decertified for the year in which it claimed the refundable research credit. In the above example, the entire $270,000 that Company B received as a refundable credit ($250,000 used to offset its liability in excess of the 75% limitation imposed on regular corporations by G.L. c. 63, § 38M(d), plus the actual $20,000 cash refund) must be recaptured. All of this $270,000 is attributable to its refundable life sciences research credit award. Accordingly, Company B may not reduce this $270,000 recapture tax by offsetting any nonrefundable carryforward or current year credits against it.

Example 5: Assume that Company A in Example 1 never met its job hiring and retention goals for either Year 1 and Year 2 of its jobs commitment period (*i.e*., from January 1, 2010 through December 31, 2011), and was therefore at material variance with its commitments since 2009, the year in which it was originally granted certification as a life sciences company. Assume further that, despite this fact, the Center decides not to revoke Company A's certification at the end of Year 1, pursuant to its authority under the provisions of G.L. c. 23I, § 5(e)(2). The Center must, however, revoke Company A's certification when independent investigations conducted in two consecutive years determine that representations made by Company A are materially at variance with its conduct. *See* G.L. c. 23I, § 5(g).

On March 31, 2012, the Center revokes Company A's certification. *Since* Company A was never in compliance with its jobs commitments, it must recapture the entire amount of the credit it claimed, including any amount claimed on its 2009 return in anticipation of meeting these commitments. This amount must be self-assessed and reported by Company A as additional recapture taxes due on its return for 2012, the year in which the Center actually revoked the Company's certification. As indicated above, after recapturing the amount of the credit refunded, Company A may be entitled to claim any research credits it otherwise would have had available under G.L. c. 63, § 38M in the absence of being a certified life sciences company. However, such nonrefundable research credits may not be used to offset Company A's tax liability resulting from recapture of its refundable research credit under G.L. c. 63, § 38M(j)(2).

Example 6: Assume the same facts as in Example 1, except that Company A was in compliance with its job hiring and maintenance commitments during 2010, (Year 1) but was at material variance with these commitments during 2011 (Year 2). The Center revokes Company A's certification on December 31, 2012, effective January 1, 2011. Since Company A was in compliance with its commitments only during Year 1 of its 5 year jobs commitment period, it is only entitled to 1/5 of the refund it received. Taxpayer received $540,000 as a refund, which represents 90% of the $600,000 available excess research credits it had. Under these facts, Taxpayer is entitled only to $108,000 (i.e. 1/5 of $540,000). In this example, the amount of recapture is calculated by multiplying the amount of the credit taken by a fraction, the numerator of which is the number of years that Company A was not in compliance with its commitments, and the denominator of which is the total number of years of the jobs commitment. Thus, assuming Company A claimed the $540,000 on its return, and received it as a refund, 4/5 of this amount, (*i.e.,* $ 432,000) must be recaptured and be paid as additional tax on Company A's tax return for 2012, the year in which the Center actually revoked the company's certification.

Assume, on the other hand, that Company A was in compliance during both Year 1 and Year 2, but not in Year 3 (2012). Assume further that the Center revoked Company A's certification on March 1, 2013, effective January 1, 2012. In that case, since Company A was in compliance for only 2 of the 5 years of its jobs commitment period, it is only entitled to claim 2/5 of the refund it received (i.e. 2/5 of $540,000 = $216,000). The remaining 3/5 of the previously received refund amount (i.e., $ 324,000) must be recaptured and paid on its tax return for 2013, the year in which the Center actually revoked Company's certification.

D. Refundable Life Sciences Investment Tax Credit under G.L. c. 62, § 6(m); c. 63, § 38U

1. Amount of Credit

A certified life sciences company may, to the extent authorized pursuant to the life sciences tax incentive program, take a life sciences investment tax credit (ITC) credit against the taxes imposed under G.L. c. 62 or 63, as applicable, in an amount equal to 10 percent of the cost of qualifying property acquired, constructed, reconstructed or erected during the taxable year and used exclusively in the commonwealth. ("the 10% life sciences ITC") *See G.L.* c. 62, § 6(m)(2); c. 63, § 38U, as applicable, for rules concerning the calculation of the 10% life sciences ITC. *Cf.* G.L. c. 63, § 31A for rules pertaining to the general 3% ITC available to other taxpayers, including the 50% ITC credit limitations imposed upon such taxpayers under G.L. c. 63, § 31A(c) and G.L. c. 63, § 32C. For taxpayers claiming the general ITC under those provisions, the maximum amount of credits, otherwise allowable in any one taxable year to a corporation shall not exceed 50% of its excise imposed by G.L. c. 63, § 32 or 39. There is no such 50% limitation for certified life sciences companies claiming the life sciences ITC. In general, the life sciences ITC is calculated as follows:

With respect to the property which is disposed of or ceases to be in qualified use prior to the end of the taxable year in which the credit is to be taken, the amount of the credit shall be that portion of the credit which represents the ratio which the months of qualified use bear to the months of useful life. For purposes of this subsection, useful life of property shall be the same as that used by the corporation for depreciation purposes when computing federal income tax liability. If property on which credit has been taken is disposed of or ceases to be in qualified use prior to the end of its useful life, the difference between the credit taken and the credit allowed for actual use must be added back as additional taxes due on the return for the year in which the Center revokes a company's certification. However, if such property is disposed of or ceases to be in qualified use after it has been in qualified use for more than twelve consecutive years, it shall not be necessary to add back any of the credit. *See* G.L. c. 62, § 6(m)(2); c. 63, § 38U, as applicable.

2. Refundable amount

If a credit allowed under G.L. c. 62, § 6(m)(2) or G.L. c. 63, § 38U exceeds the tax otherwise due under those chapters, 90 percent of the balance of such credit may, at the option of the taxpayer and to the extent authorized by the Center pursuant to the life sciences tax incentive program, be refundable to the taxpayer for the taxable year in which qualifying property giving rise to that credit is placed in service. If such credit balance is refunded to the taxpayer, the credit carryover provisions of G.L. c. 62, § 6(m)(3) or c. 63, §38U(e) shall not apply. *See* G.L. c. 62, § 6(m)(5); G.L. c. 63, § 38U(h).

The maximum amount of the life sciences ITC a certified life sciences company is allowed to receive as a refund is the lesser of: 1) 90% of the gross award amount, or: 2) 90% of the balance of its available excess ITC remaining after reducing its tax liability to 0.

3. Carryforwards

A certified life sciences company may not carry forward the balance of any life sciences refundable ITC award after the receipt of a refund. See G.L. c. 63, § 38U(h). Thus, if a certified life sciences company receives a refund of the 10% life sciences ITC, none of the remaining gross award may be carried forward as additional life sciences ITC. However, a taxpayer may be allowed to carry forward excess ITC credits it has available under the general ITC provisions of G.L. c. 63, § 31A.

4. Amount of credit recapture

If a company’s certification as a life sciences company is revoked, all or a portion of the refundable life sciences investment tax credit it previously received must be recaptured. The method of recapture for this credit is different from the method of recapture for the refundable research credit. For the life sciences ITC credit, the applicable[6] recapture provisions of G.L. c. 62, § 6(m)(2) (for chapter 62 taxpayers) or G.L. c. 63, § 38U (for chapter 63 taxpayers) shall apply. *See* G.L. c. 23I, § 5(a)(3).

If the property on which a credit has been taken is disposed of otherwise ceases to be in qualified use prior to the end of its useful life, the difference between the credit taken and the credit allowed for actual use must be self-assessed and added back as additional taxes due in the year the Center revokes a Company's certification. The credit allowed for actual use of qualifying property is calculated based upon the ratio which the months of qualified use bear to the months of useful life of the property.

For purposes of recapturing the life sciences ITC, in accordance with G.L. c. 23I, §

5(e) and in accordance with the general rules governing the general 3% ITC recapture in the context of the revocation of a manufacturing corporation classification, see 830 CMR 58.2.1(9)(c), property ceases to be in qualified use as of the effective date of revocation of a life sciences company's certification, i.e., the first day of the tax year in which the material variance commenced.

The calculation of the amount to be recaptured commences from the first day of the taxable year for which revocation is effective (i.e., the first day of the taxable year in which the material variance commenced, as determined by the Center). However, if such property is disposed of or ceases to be in qualified use after it has been in qualified use for more than twelve consecutive years, it is not necessary to add back the amount recaptured as additional tax.

If a life sciences company received the refundable life sciences ITC pursuant to G.L. c. 63, § 38U(h), and is subsequently decertified, it must recapture that portion of the refunded credit previously taken for its period of non-compliance. The following examples illustrate the rules governing this recapture.

Example 7: Assume that certified life sciences Company A, which is also a qualified manufacturing corporation eligible to claim a 3% ITC under G.L. c. 63, § 31A and a calendar year taxpayer, is granted certification in December, 2009 and that its jobs commitment period is from January 1, 2010 (Year 1) through December 30, 2014 (Year 5). Assume further that it has $10,000 of available excess life sciences ITC for property placed in service on January 1, 2009 with a useful life of 10 years. Assume further that it elected to have 90% of the allowable $10,000 credit, i.e., $9,000, refunded in 2009, pursuant to G.L. c. 63, § 38U(h).

On December 31, 2010, the Center revokes Company A's certification because it determines that Company A never met its requirements set forth in its certification proposal. The Commissioner will recapture the total amount of the credit refunded. Thus, $9,000 must be assessed and paid as additional tax by Company A on its 2010 return,[7] which is the year in which the Center actually revoked Company A's certification. However, upon decertification and recapture of the refunded life sciences ITC, Company A may nonetheless claim any other statutorily allowed credits that it could have claimed in the absence of being certified as a life sciences company. In this instance Company A may claim $3,000 of the regular 3% ITC associated with its purchase in 2009. This $3,000 may not be used to offset any of the $9,000 recapture tax attributable to the refunded life science ITC award, but it may be used to reduce any other current excise tax of Company A, subject to the 50% limitation rule imposed under G.L. c. 63, § 32C, or may be carried forward to subsequent periods.

Example 8: Assume the same facts as Example 7, above, except that Company A was in compliance during 2010, but was at material variance with its commitments in 2011. Assume further that the Center revokes its certification on December 30, 2011, effective January 1, 2011. Under the rules set forth in this TIR, eligible ITC property will be deemed not to be in qualified use as of the effective date of revocation (i.e., January 1, 2011). Company A took the entire 90% of the allowable ITC as a refundable credit in 2009, when it was in compliance with its commitments set forth in its certification proposal, Company A must recapture a portion of the refundable credit it took in 2009, as follows. Company A was in compliance for only one of the ten years of the useful life of the property. Accordingly, it is only entitled to 1/10 of the

$9,000 (*i.e*., $900) that it previously received as a refundable credit. The remaining $8,100 of the previously refunded credit must be assessed and paid as additional recaptured taxes due on Company A's return for 2011, which is the year in which Company A's certification is actually revoked (*i.e*., on December 31, 2011).

Note that even if property remains in qualified use throughout a life sciences company's five-year certification period, ITC recapture may still be required after this period expires under the general recapture provisions of G.L. c. 63, § 31A, if the property is disposed of before the end of its useful life, unless the property is in qualified use for more than 12 years.

Example 9: ITC scenario where awardee receives the entire 90% of the eligible life sciences ITC as a refund. Certified life sciences Company B, a calendar year taxpayer, places a piece of qualifying property in service on January 1, 2010. The cost of the property is $500,000 and its useful life is 10 years. Pursuant to the Tax Incentive Agreement between the Center and Company B, it is awarded a refundable 10% life sciences investment tax credit of up to $50,000. In 2010, assume that Company B's life sciences investment tax credit exceeds the tax due for the taxable year. Accordingly, Company B elects to receive 90% of the maximum award amount (i.e., 90% of $50,000 = $45,000) as a refundable credit, and the remaining $5,000 of the award amount is eliminated.

In 2011, the Center revokes Company B's certification, effective January 1, 2011. Since Company B took the entire refundable life sciences ITC in 2010, when it was in compliance with its commitments, a portion of this amount must be recaptured under the method described in this TIR. Since it was in compliance for only one year of the property's 10 year useful life, 90% of the amount taken must be self-assessed and reported on its 2011 return, the year in which the Center revoked its certification. Although Company B must recapture this amount, it has not disposed of the property and is therefore entitled to claim the otherwise allowable portion of the 3% ITC under G.L. c. 63, § 31A that is not subject to recapture, including any allowable carryover amounts that it would otherwise have had available if it were not subject to the limitations on taking such amounts as a certified life sciences company.

/s/Amy Pitter
Amy Pitter
Commissioner of Revenue

AP:MTF:wrd

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TIR 13-6

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[1] Since the issuance of TIR 08-23, the Massachusetts Legislature added another tax incentive to the Life Sciences Incentive Program in the form of a refundable jobs credit. *See* St. 2011, c. 68, §§ 65, 70. Effective for tax years beginning on or after

January 1, 2011, a taxpayer, to the extent authorized by the Life Sciences Tax Incentive Program, may be allowed a refundable jobs credit against the tax liability imposed under G.L. c. 62, the personal income tax, or G.L. c. 63, the corporate excise. St. 2011, c. 68, § 65, amending G.L. c. 62, § 6 by adding new subsection (r); St. 2011, c. 68, § 70, amending G.L. c. 63 by adding new section 38CC. A taxpayer claiming a life sciences refundable jobs credit must commit to the creation of a minimum of 50 net new permanent full-time positions in Massachusetts. The amount of life sciences jobs credit allowed to a taxpayer will be determined by the Massachusetts Life Sciences Center in consultation with the Department of Revenue. The refundable jobs credit is subject to all the requirements of G.L. c. 23I, including the requirements set out in TIR 08-23. The total dollar amount of the various life sciences tax incentives, including the refundable jobs credit, for qualifying life sciences companies is subject to an annual cap of $25 million.

If a life sciences jobs credit claimed by a taxpayer exceeds the tax otherwise due under the personal income tax or the corporate excise, as applicable, 90 percent of the balance of such credit may, to the extent authorized by the life sciences tax incentive program, be refundable to the taxpayer. Excess credit amounts shall not be carried forward to subsequent taxable years. If a taxpayer becomes subject to recapture of the refundable jobs credit under G.L. c. 62, § 6(r) and G.L. c. 63, § 38CC, recapture rules similar to those set forth in this TIR regarding the refundable research credit under G.L. c. 63, § 38M(j) shall apply.

[2] Note that a company that has been decertified and that has recaptured the credits or other benefits it has previously received as a certified life sciences company, may subsequently become eligible to claim certain statutorily allowed credits or other benefits it could not previously have taken due to limitations on receiving such benefits as a life sciences company. For example, a decertified life sciences company that received a life sciences research credit as a refund may, after having the refund recaptured, be eligible to claim the amount of research credits that it could have otherwise claimed as a qualified research and development corporation, subject to the general provisions of G.L. c. 63, § 38M, including the restoration on its books of any carryforward amounts that would have been allowed under G.L. c. 63, § 38M(f) in the absence of receiving a refund of its available excess research credit under G.L. c. 63, § 38M(j)(2). However, the company may not use any non-refundable carryforward amounts to reduce the additional recapture taxes due on account of the recapture of a previously refunded life sciences research credit. Similarly, a life sciences company that has been de-certified after it received a life sciences investment tax credit under G.L. c. 63, § 38U may be eligible to claim other credits it could have otherwise taken in the absence of being a certified life sciences company. Examples of such benefits include the regular investment tax credit authorized for certain other corporations under G.L. c. 63, § 31A (e.g., a manufacturing corporation, or a business corporation engaged primarily in research and development, which has been deemed to be such under G.L. c. 63, § 42B); the low income housing tax credit authorized under G.L. c. 63, § 31H; and the tax credit for certain certified projects under the economic development incentive program under G.L. c. 63, § 38N, provided that the requirements of those sections are met.

[3] Note, further, that in instances where a decertified life sciences company was awarded a refundable research credit under the life sciences tax incentive program and used a portion or all of the refundable amount to reduce its liability below the amount which would otherwise have been allowed a regular corporation due to the 75% limitation rules of G.L. c. 63, § 38M(d), the Commissioner will, for purposes of

recapturing the life sciences award, treat such applied amounts as a refundable credit subject to the limitation on offsets described above. This is because the life sciences company received the benefit of being allowed to reduce its liability for the taxable year further than a regular corporation would have been allowed to do because of the 75% limitation set forth in G.L. c. 63, § 38M(d). If recapture of this amount is subsequently required, a decertified life sciences company may not reduce its liability attributable to the recaptured amount by applying any nonrefundable credits against it. *See* Examples 3 and 4 for further illustration of these rules.

As a second example, assume the following facts. Life Sciences Company X was awarded a 10% refundable life sciences investment tax credit for use in 2009. It had enough tax liability in 2009 to apply the entire 10% life sciences ITC gross award amount against its liability. Additionally, it had sufficient excess available regular research credits (unrelated to any life sciences award) that it also could have used to reduce its 2009 liability. Instead of opting to receive a refund of its life sciences ITC, it applied its entire Life Sciences ITC award to reduce its 2009 liability, thereby leaving its existing nonrefundable research credits available for carryforward to reduce its liability in future years. In 2011, the Center decertified Company X, subjecting it to recapture of the 10% ITC it used to reduce its 2009 liability. Since the life sciences ITC was not taken as a refund, Company X may, upon recapture of the 10% ITC use its available current nonrefundable credits (subject to any particular limitations applicable to those credits), to offset the resulting $10,000 liability attributable to the recapture of the life sciences ITC. Under these facts, it may use its nonrefundable research credits, subject to the 75% limitation rules in G.L. c. 63, § 38M, to offset its $10,000 recapture tax. Similarly, if it had available nonrefundable investment tax credits instead of nonrefundable research credits, it could use those tax credits to offset this recapture liability, subject to the 50% limitation rules in G.L. c. 63, § 32C. Contrast Example 7, which illustrates the limitation on a decertified company's use of nonrefundable carryforward and current year credits to offset its recapture tax in situations where it received a refund of the life sciences ITC.

[4] In certain instances, depending on the facts and circumstances, the refundable amount may be less than either of these amounts. See, e.g., Example 3, below.

[5] Section 38M(d) of chapter 63 limits the amount of research credit that a corporation may use in offsetting its liability in a particular taxable year. The amount of the credit is limited to 100% of a corporation's first $25,000 of excise liability, as determined before the allowance of any credits, plus 75% of the corporation's excise, as so determined, in excess of $25,000 ("the 75% limitation").

[6] Note that pursuant to G.L. c. 62, § 6(m)(3) and G.L. c. 63, § 38U, but only to the extent authorized by the Center, a taxpayer may be allowed to carry over and apply to its excise for any one or more of the 10 succeeding ten taxable years, the portion, as reduced from year to year, of those credits which exceed the excise for the taxable year or, in the case of chapter 63 taxpayers, those credits which were not otherwise allowed under G.L. c. 63, § 38U (c), or which exceed the excise for the taxable year. *See* G.L. c. 63, § 38U(e). However, the Center may generally limit any incentive or incentives to specific dollar amount or time duration, or in any other manner deemed appropriate by the Commissioner. *See* G.L. c. 23I, § 5(d). Pursuant to this authority, the Center generally does not permit any carryover of the life sciences investment tax credit that, in its discretion, it could otherwise authorize under G.L. c. 62, § 6(m)(3) or G.L. c. 63, § 38U(e). Accordingly, the carryover provisions of these sections do not apply to life sciences ITC award amounts.

[7] Because Company A received a refundable ITC credit in this example, there is no

carryover issue under these facts. *See* G.L. c. 63, § 38U(h).

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